

IN THE HIGH COURT OF ORISSA AT CUTTACK

FAO No.417 of 2003

Satyabhama Sahoo and others

Appellants
....
Mr. A. Sahoo, Advocate

-versus-

Sri Beleswar Mahadev, Bije Respondents
Alishabazar, Cuttack and others

Ms. S. Mohanty, Advocate for Respondent Nos. 1 to 2(e)
Ms. P. Naidu, Advocate for Respondent No. 3

CORAM:
JUSTICE B. P. ROUTRAY

ORDER
14.12.2022

Order No.

23.

1. The matter is taken up through Hybrid mode.
2. Heard Mr. A. Sahoo on behalf of Mr. S.K. Das, learned counsel for the Appellants, Ms. S. Mohanty, learned counsel for the Respondent Nos.1 to 2(e) and Ms. P. Naidu, learned counsel for Respondent No.3.
3. Present appeal is directed against the impugned order dated 06.09.2003 of learned 2nd Additional Civil Judge (S.D.), Cuttack passed in Misc. No. 23 of 2002 (arising out of T.S. No. 116 of 1997).
4. Present Appellants are the Defendants (including LR's of some of the Defendants). The original Respondent Nos.1 & 2 are the Plaintiff and Proforma Defendant No.5 in the suit, i.e. T.S. No.116 of 1997.

5. Before delving into the merit of the appeal, some background facts necessary to be delineated are that, T.S. No.116 of 1997 was filed in the court of the Civil Judge (SD), 1st Court, Cuttack by the deity – Sri Sri Beleswar Mahadev represented through Durga Charan Sahoo, against Bhimasen Sahoo, the predecessor-in-interest of present Appellant Nos.1 to 7 and rest of the Appellants, as defendants, praying for issuance of the decree of eviction against the Defendants and to deliver possession of suit scheduled properties along with damages. The notice was served on the original Defendants, i.e. Bhimasen Sahoo and present Appellant Nos.8 to 10. Despite valid service of notice, none of the Defendants entered appearance.

6. Accordingly, all such Defendants were set ex-parte on 16.04.1998. The court then proceeded in the suit and the ex-parte hearing was completed on 12.11.1998. The ex-parte judgment was pronounced on 22.12.1998 followed by the ex-parte decree. Then Execution Case No.25 of 1999 was initiated by the Plaintiff. Upon service of notice in the said execution case, the successors-in-interest (LRs) of Bhimsen Sahoo and Defendant Nos.2 to 4 came up with a petition under Order 9 Rule 13, CPC on 03.07.2001 praying to set aside the ex-parte decree dated 22.12.1998. The petition filed under Order 9 Rule 13, CPC was initially numbered as Misc. Case No.243 of 2001 which was subsequently numbered as Misc. No.23 of 2002 on transfer to the 2nd Additional Court, Cuttack. The Plaintiff was noticed and he contested the case. The parties adduced their evidence. Learned 2nd Additional Civil Judge (Senior Division), Cuttack framed two issues, which are regarding sufficient clause for absence of the

Defendants in the suit and sufficient reason to condone the delay in presenting the petition to set aside the ex-parte decree, respectively.

7. Learned 2nd Additional Civil Judge (Senior Division), Cuttack concluded against the Defendants on both the issues and dismissed the petition ultimately. Said order of rejection is the subject matter of challenge in the present appeal. It needs to be mentioned here that the property in question is a Khasmahal land with building standing in the name of the deity – Shri Shri Beleswar Mahadev, Bije Alishabazar, Cuttack. The Plaintiff is the Marfatdar and the Khasmahal lease is in favour of the deity, as it reveals from the copy of judgment rendered in T.S. No.116 of 1997 produced in course of hearing.

8. Mr. A. Sahoo, learned counsel for the Appellants submits that though suffering of Bhimsen Sahoo from cancer on the date of service of summons in the suit and his subsequent death on 05.08.1999 is not disputed, still the learned court declined to hold existence of sufficient cause in favour of the Defendants compelling their absence in the suit.

9. Ms. Mohanty, learned counsel for Respondent Nos.1 to 2(e) on the other hand submits that the finding of the trial court is specific to the extent that the Defendants have failed to appear in the suit despite valid service of notice on them and adequate opportunity of time was extended in their favour. She further submits that the property in question is belonging to the deity, who is a perpetual minor and sufficient time being lapsed in the

meantime, the plaintiff would sustain substantial loss in case the suit is tried *de-novo*.

10. It is seen that one witness (P.W.1), who is original Defendant No.2, was examined on behalf of the Defendants to support their case for non-appearance before the trial court. As per his evidence, original Defendant Nos.2 to 4, upon receipt of notice in the suit, authorized Bhimsen Sahoo (original Defendant No.1) to appear and contest on their behalf. Admittedly, as held correctly by the learned Sub-Judge, no evidence to satisfy their contention regarding authorization given in favour of Bhimasen Sahoo could be produced before the trial court. P.W.1 has also admitted that Bhimsen Sahoo was a Government employee working in Government Press and till his death, i.e. on 05.08.1999 he used to attend the office in a bicycle covering a distance of 5 kms every day.

11. On the date the Defendants were set ex-parte, i.e. on 16.04.1998, the notices were validly served on all the Defendants and no quarrel is made on this aspect. The delay, considered from 16.04.1998 to 03.07.2001, i.e. till presentation of the petition under Order 9 Rule 13 C.P.C. is around three years and more. Though the fact of death of Bhimsen Sahoo due to cancer is not disputed, still the cause of non-appearance of all the Defendants, attributed towards the responsibility of Bhimsen Sahoo, is not found satisfactory. It is for the reasons that, first, no evidence on authorization given to Bhimsen Sahoo is produced and secondly, Bhimsen Sahoo was not that incompetent either physically or mentally to attend the court for contesting the suit. Moreover, no

genuine excuse in favour of Respondent Nos.1 to 4 is noticed to justify their abstinence from appearance in the court, nor do they give any convincing reason for the same. Further, the fact remains that, though Bhimsen Sahoo died on 05.08.1999, but till 03.07.2001 none of the Defendants think it fit to come to the Court for such long period of two years despite their knowledge through valid service of notice.

12. The Hon'ble Supreme Court in the case of *Maniben Devraj Shah v. Municipal Corporation of Brihan Mumbai*, (2012) 5 SCC 157, has observed that, "what colour the expression sufficient cause would get in the factual matrix of a given case would largely depend on bonafide nature of explanation. If the court finds that there has been no negligence on the part of the applicant and the cause shown for the delay does not lack bonafides, then it may condone the delay. If on the other hand, the explanation given by the applicant is found to be concocted or he is thoroughly negligent in prosecuting his cause, then it would be a legitimate exercise of discretion not to condone the delay."

13. In the instant case the delay is more than three years. No other reason except regarding death of Bhimasen Sahoo is explained by the Defendants to condone the delay, which as per the discussions made above are not found satisfactory. It is of course another factor that in the meantime almost around 25 years has been passed from the date of ex-parte decree.

14. For the reasons stated above and discussions made, no reason is found to interfere with the impugned order and as such, the prayer of the Appellants is rejected.

15. In the result the appeal is dismissed, but without any order as to costs.

16. It is needless to observe that all interim orders passed in the appeal stand discharged.

(B.P. Routray)
Judge

